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No. 05-1269

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

EXIDE TECHNOLOGIES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

***AMICUS CURIAE* BRIEF OF THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER EXIDE TECHNOLOGIES**

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AMICUS CURIAE BRIEF OF THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONER EXIDE TECHNOLOGIES

Pursuant to Supreme Court Rule 37, the National Solid Wastes Management Association ("NSWMA") files this *amicus curiae* brief in support of the Petition for Writ of Certiorari in the above-captioned case.[1] The written consents of Petitioner and Respondent to the filing of this brief have been filed with the Clerk.

[1]As required by Supreme Court Rule 37.6, the NSWMA states that counsel for the parties did not author this brief in whole or in part and that there are no other persons or entities, other than the NSWMA and its members or counsel, who made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

The NSWMA is a voluntary association consisting of about 2,000 member companies operating in all fifty states, and approximately 100 members within the Third Circuit, all of whom are engaged in the business of providing waste handling, transportation and disposal services to municipal, residential and commercial customers. The NSWMA is especially interested in liability issues, particularly those under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 ("CERCLA" or "Superfund"), which affect companies in the waste management business. During the last twenty-five years, government regulations have become more complex, increasing the cost of waste management services. As a result, there has been a substantial consolidation of the waste management industry. Many NSWMA members have acquired the assets of other companies in the solid waste handling, transportation and disposal business, thus increasing the sophistication and efficiency of waste management in this country. Because of the Third Circuit's liability ruling in the case below, and the uncertainty regarding the scope of successor liability in several other circuits, NSWMA members now face significant, unanticipated, unbargained for, and unquantified but potentially costly CERCLA liability for the prior unrelated actions of the business entities who sold their assets to these individual NSWMA members.

The Third Circuit's ruling is also particularly relevant to NSWMA members because approximately 250, or twenty-five percent, of the sites scheduled for cleanup under CERCLA are landfills that accepted waste from municipal, residential and commercial customers. *EPA Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites*, 63 Fed. Reg. 8197 (February 18, 1998). NSWMA members face potentially significant liability at these Superfund sites and others, many of which are now pending in litigation. For these reasons, the NSWMA has a direct and concrete interest in this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Third Circuit's ruling determined that evolving federal common law, rather than established state law, governs questions of corporate successor liability under CERCLA. The Third Circuit further decided that as a matter of federal common law, questions of successor liability in asset transfers under CERCLA will be determined pursuant to an expansive "de facto merger" test, which is inconsistent with Pennsylvania law. The NSWMA supports the Petition for Writ of Certiorari on the important issue of successor liability under CERCLA for the following reasons.

The Third Circuit's ruling misapplied this Court's controlling precedents, *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) and *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). *O'Melveny* and *Kimbell Foods* establish a strong presumption against the creation of federal common law where, as in this case, the federal statute is otherwise comprehensive and detailed, but contains no language abrogating state common law principles, particularly principles regarding corporate liability.

Proper application of the *O'Melveny* and *Kimbell Foods* test demonstrates that a federal common law rule of successor liability under CERCLA is unwarranted because: (1) Congress did not, in CERCLA, direct the courts to create a federal common law rule of successor liability; (2) the existence of a significant conflict between CERCLA's policies and the use of state law is a precondition to creation of federal common law and no such conflict exists; (3) there is no need for a national uniform rule of successor liability; and (4) a federal common law rule would retroactively upset the well-settled expectations of businesses, including NSWMA members, made in reliance on longstanding state corporate law of successor liability; would disrupt established commercial relationships predicated on that state law; and would create uncertainty in both future commercial transactions and in pending and future CERCLA

litigation involving many millions of dollars in potential liabilities.

By misapplying this Court's precedent, the Third Circuit has also aggravated an existing conflict among the circuit courts, many of which have held that state law, and not federal common law, applies to CERCLA liability questions affecting state-created business entities, including such closely related questions as the capacity of a dissolved corporation to be sued, the liability of limited partners and the validity of an inter-corporate contractual release of CERCLA liability.

ARGUMENT

I. THE THIRD CIRCUIT MISAPPLIED THIS COURT'S PRECEDENTS IN ADOPTING A FEDERAL COMMON LAW RULE ON THE IMPORTANT ISSUE OF SUCCESSOR LIABILITY UNDER CERCLA.

A. The Third Circuit Failed to Properly Apply the Presumption Against Creating A Federal Common Law of Successor Liability Under CERCLA.

In *O'Melveny* and *Kimbell Foods*, this Court reinforced the longstanding presumption against the creation of federal common law. In all but the most extraordinary cases, federal courts should not adopt court-made rules to supplement comprehensive and detailed federal regulatory programs like CERCLA. Within the federal system, the function of weighing and appraising the various issues concerning the nature and scope of liability to impose on various entities "is more appropriately for those who write the laws, rather than for those who interpret them." *O'Melveny*, 512 U.S. at 89 (quoting *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 98 n. 41 (1981) (quoting *United States v. Gilman*, 347 U.S. 507, 512-13 (1954)). *Accord Atherton v. FDIC*, 519 U.S. 213, 218 (1997).

This Court has been especially reluctant to create federal common law rules that preempt well-established rules of state corporate law. In *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991), this Court reiterated that the presumption against creating federal common law

> is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state law standards. Corporation law is one such area.

Id. at 98 (citations omitted). *See also United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (". . . the failure of a statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common law principle, the statute must speak directly to the question addressed by the common law.") (citing *United States v. Texas*, 507 U.S. 529, 534 (1993)); *Burks v. Lasker*, 441 U.S. 471, 478 (1979) ("Congress has never indicated that the entire corpus of state corporate law is to be replaced simply because a plaintiff's cause of action is based on a federal statute."). Significantly, the Third Circuit itself recognized this presumption against creating federal common law in the area of corporate liability "because business decisions typically proceed in reliance upon the applicable state standard." Opinion of September 6, 2005 ("Opinion"), *reproduced in* Pet'r App. at A8 (citations omitted). The Third Circuit simply did not apply the very presumption it acknowledged.

Corporations are creatures of state law, wholly dependent on state law for their existence, rights, powers and liabilities. Accordingly, only in the most extraordinary circumstances should a federal court create a federal common law rule, such as a rule of successor liability, that would preempt state corporate law. *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991).

B. The Third Circuit Failed to Properly Recognize the Absence of Any Language In CERCLA Directing the Replacement of the Existing State Law of Successor Liability.

The threshold inquiry is whether in CERCLA's comprehensive statutory provisions, Congress directed the federal courts to create federal common law to resolve the issue of successor liability. CERCLA contains only one directive to apply federal law, on an issue entirely unrelated to corporate successorship.[2] Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), permits a liable party to bring a contribution action to recover costs from another liable party. Section 113(f) of CERCLA specifically provides that:

> Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law.

42 U.S.C. § 9613(f)(1). Accordingly, in the context of contribution actions among parties determined to be liable, Congress weighed and appraised the various issues, and unambiguously provided that the proced res to be followed and the method for allocating costs among those liable parties must be determined by federal law.

In stark contrast, CERCLA's detailed regulatory scheme does not direct the federal courts to create federal common law to define the scope of liability arising from business transactions, including liability for alleged corporate successors. This Court and the Third Circuit both acknowledge that CERCLA is silent on the issue of replacing state corporate common law. In *United*

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[2] CERCLA Section 101(32), 42 U.S.C. § 9601(32), provides that CERCLA liability shall be construed to be the standard of liability under the Clean Water Act, 33 U.S.C. § 1321. This section does not direct the creation of federal common law, but rather defines CERCLA liability by reference to a federal statute.

States v. Bestfoods, 524 U.S. 51 (1998), this Court addressed whether CERCLA displaced the traditional state common law rule that a parent corporation is derivatively liable for the acts of its subsidiary only when the corporate veil is pierced:

> Nothing in CERCLA purports to reject this bedrock principle, and against this venerable common law backdrop, the Congressional silence is audible.

Id. at 62. More generally, the Court found that CERCLA gave no indication that the "entire corpus of state corporation law is to be replaced" just because the cause of action is based on CERCLA, *id.* at 63, and that any CERCLA-specific rule of derivative liability cannot arise from congressional silence and "CERCLA's silence is dispositive," *id.* at 70. See also Opinion, Pet'r App. at A5 ("CERCLA is not, however, a model of legislative draftsmanship and successor liability is one of its puzzles". . . "the statute fails to address the issue expressly....").

Congress demonstrated its ability to direct that federal common law be used in resolving the procedures for contribution actions under section 113(f). Under *O'Melveny* and *Kimbell Foods*, absent extraordinary circumstances Congress must have intended for state law to apply to other issues for which it did not so direct the federal courts, including the issue of corporate successor liability.

C. The Third Circuit Misapplied the *Kimbell Foods* Test in Determining Federal Law Governs Successor Liability Under CERCLA.

In the absence of this express Congressional directive, there is a strong presumption against the creation of federal common law of successor liability under CERCLA. This presumption can be rebutted only in extraordinary cases after applying the following three-part test: (1) whether there is a need for a national uniform body of law; (2) whether application

of state law would frustrate the specific objectives of the federal program in question; and (3) whether the application of a federal common law rule would disrupt commercial relationships predicated on state law. *Kimbell Foods*, 440 U.S. at 728-29. In *O'Melveny*, this Court further refined the second prong of the *Kimbell Foods* test, holding that creation of "federal common law must be limited to where there is a significant conflict between some federal policy or interest and the use of law." *O'Melveny*, 512 U.S. 87. Elevating the second prong of the *Kimbell Foods* test above all others, *O'Melveny* held further that "our cases uniformly require existence of such a conflict as a precondition for recognition of a federal rule of decision." *Id.* (citations omitted). *See also Atherton v. FDIC*, 519 U.S. 213, 218 (holding that a "significant conflict between some federal policy or interest and use of state law . . . must first be specifically shown") (citations omitted).

For the following reasons, the Third Circuit misapplied the three-part *Kimbell Foods* test, as further articulated in *O'Melveny*, in determining that federal law governs successor liability under CERCLA.

1. No significant conflict exists between CERCLA's policies and application of the state law of successor liability.

CERCLA promotes two primary purposes. The first purpose ensures that those responsible for any damage, environmental harm, or injury from hazardous substances bear the cost of their actions. *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991). This is known as the "polluter pays" policy. Second, CERCLA aims to facilitate efficient and prompt responses to environmental harm. *Id.* Use of state law to determine successor liability would facilitate, not frustrate, these CERCLA policies.

State law under the traditional "mere continuation" and "de facto" merger tests ensures the acquiring corporation has some responsibility for or nexus to the actions of the selling

company by requiring that the acquiring corporation have common management, officers, directors and stockholders with the selling corporation -- *i.e.*, the purchaser is the same corporation in a new corporate form. *Grand Labs, Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277, 1282-83 (8th Cir. 1994); *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977). The selling and acquiring corporations are not wholly distinct, and the purchaser is held liable not for the acts of another entity, but for its own acts during a prior corporate life. These traditional state successor liability rules facilitate CERCLA policies by ensuring that the entity responsible for the harm pays for the harm.[3] These rules respect the well-settled commercial expectations of NSWMA members in the asset acquisitions they participated in over the last twenty-five years.

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[3]Any concern that states in the future will alter their successor liability rules to relieve corporations of CERCLA liability is also unfounded. As Circuit Court Judge Kennedy stated in her concurring opinion in *Anspec*:

> Any fears that states will engage in a "race to the bottom" in their effort to attract corporate business and enact laws that limit vicarious liability are in my opinion groundless. States have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and EPA and they share a complementary interest with the United States in enforcement of laws like CERCLA that are used to remedy environmental contamination. I see no necessity to create federal common law in this area to guard against the risk that states will create safe havens for polluters.

922 F.2d at 1250 (Kennedy, J., concurring). *See also*, Opinion, Pet'r App. at A16. ("As a general matter, we agree it is unlikely that states would attempt to immunize their corporations from CERCLA liability.").

Moreover, the conflicting and unresolved federal common law of successor liability under CERCLA, *infra* at 12, is more likely to result in vigorous, time-consuming litigation on these issues, which will delay rather than expedite remediation. State law, on the other hand, imposes more certain and settled liability principles, which focus on salient, well-established and objective criteria. Accordingly, state law promotes prompt, voluntary cleanups.

The Opinion cites to only two remote, potential conflicts between state successor liability standards and certain secondary purposes of CERCLA. The Third Circuit contends that reliance on state law will allegedly (1) increase CERCLA litigation and transaction costs, and (2) diminish a liquid market in the sale of brownfields assets. Opinion, Pet'r App. at A16.

As set forth *infra* at 11-12, state successor liability standards are vastly more uniform than existing federal common law. Therefore, transaction costs will be lessened by relying on well-established state successor liability standards. In addition, this Court has specifically rejected nationwide litigation and associated transaction costs as a basis for federal common law. *See O'Melveny*, 512 U.S. at 88 (observing that uniformity of law may facilitate "nationwide litigation of the suits, limiting state-by-state research and reducing uncertainty – but if avoidance of these ordinary consequences qualified as an identifiable federal interest, we would be awash in federal common-law rules") (citations omitted).

Similarly, state successor liability rules in no way inhibit the sale of brownfields assets. A brownfields asset is, in layperson's terms, property impacted by the presence of contaminants. A liquid market in brownfields assets means nothing more than the sale of brownfields properties resulting in the expansion, redevelopment or reuse of those properties. Contrary to the Third Circuit's statement, a buyer's CERCLA liability resulting from the sale of a brownfields asset arises not indirectly from any successor liability principles, but rather

directly from the buyer taking title and becoming an owner under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1). As a result, successor liability simply has no bearing on the liquidity of the market for brownfields assets.[4]

2. There is no need for a national uniform federal common law rule of successor liability under CERCLA.

The Third Circuit provided as its primary rationale for creating an expansive federal common law rule of successor liability under CERCLA that "the nature of the federal program, a comprehensive federal liability statute, counsels in favor of national uniformity." Opinion, Pet'r App. at A16. The Third Circuit's reliance on the argument that there is a need for a national uniform rule fails for three reasons.

First, the need for national uniformity is viewed as the most generic and insignificant federal interest, *O'Melveny*, 512 U.S. at 88. Second, the Third Circuit ignores the virtual uniformity of the successor liability doctrine under existing state law. Indeed, the United States, the party charged with enforcing CERCLA, has acknowledged that "the law in the fifty states on corporate dissolution and successor liability is largely uniform." *Anspec*, 922 F.2d at 1249 (Kennedy, J., concurring). *See also,*

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[4] In the Opinion, the Third Circuit incorrectly characterizes a liquid brownfields market as a primary purpose of CERCLA. On the contrary, CERCLA's primary purpose from the outset was to promote prompt cleanup of contaminated property and, as the Opinion notes, Congress did not even enact brownfields provisions until twenty-one years after it first passed CERCLA, Pet'r App. at A14-15, n. 8. Moreover, the 1,619 current CERCLA sites, *National Priorities List*, http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm (last modified Feb. 24, 2006), 71 Fed. Reg. 20016, 20052 (April 19, 2006), represent only a small fraction of the estimated 450,000 to 1,000,000 brownfields properties nationally, U.S. GAO Pub. No. GAO/RCED-95-172, *Title* 3 (June 30, 1995).

Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 159 F.3d 358, 368 (9th Cir. 1998); 15 William Meade Fletcher, et al., *Fletcher Cyclopedia of the Law of Private Corporations*, § 7122 (perm. ed., rev. vol. 2005). The only area of potential non-uniformity in state law arises from a more expansive rule of successor liability, known as the "substantial continuity" test, adopted by only a handful of states, rejected by twenty-two states and the Third Circuit, and applied exclusively in the products liability context. *City Mgmt. Corp. v. U.S. Chem. Co., Inc.*, 43 F.3d 244, 252 (6th Cir. 1994); *Restatement (Third) of Torts: Products Liability* § 12 cmt. c Reporters' Note (1998). There is no need for a uniform federal common law of successor liability, because a well-established, uniform body of state successor liability law exists already.

Third, creation of federal common law has not created uniformity. There is simply no established body of federal common law successor liability. In fact, profound disagreements about the content of the federal common law of CERCLA successor liability exist, and the lower courts directly contradict each other on threshold issues regarding the scope and predicates for successor liability. *See, e.g., Atchison*, 150 F.3d at 363 n. 5 ("While state law on successor liability is well-developed and uniform, the Courts that have attempted to fashion federal common law rules for successor liability under CERCLA have created conflicts and uncertainties over a number of issues. . ..") (citations omitted). *See also Anspec*, 922 F.2d at 1250-1251 (Kennedy, J., concurring) ("State corporate law, evolved over decades and frequently identified in state statutes, is well developed and easily discovered and applied. By contrast, at least in the near term, there is no established body of federal common law on the issues presented in this case"). The Third Circuit describes the federal common law standard it adopts as "somewhat unsettled at this frontier of successor liability." (Opinion, Pet'r App. at A23.) Using state successor liability doctrine as a guide, it would take decades for a coherent and consistent body of federal common law of successor liability to develop under CERCLA.

In sum, the purported nationally uniform federal common law of successor liability is illusory, given the current unsettled and conflicting law throughout the federal circuit courts. In direct contrast, there is near uniformity in existing state successor liability law. Therefore, there is no need for federal common law of successor liability under CERCLA.

3. Application of a federal common law rule of successor liability under CERCLA would disrupt commercial relationships predicated on existing state law.

The purpose of the general rule of non-liability in asset transfers is to promote predictability in corporate transactions and free alienability and transferability of property. *Polius v. Clark Equip. Co.*, 802 F.2d 75, 83 (3d Cir. 1983). In particular, "[p]redictability is vital in the corporate field. . . . Major economic decisions, critical to society, are best made in the climate of relative certainty and reasonable predictability." *Id.* Free alienability of property is an equally important policy underpinning state successor liability law. To this end, the general rule of non-liability under state law encourages desirable commercial transactions by reducing the buyer's risk of loss and uncertainty concerning the value of the assets purchased, making buyers and sellers more willing to enter into the asset transaction.

At the same time, traditional state corporate law recognizes the need to protect creditors from corporate transactions designed to avoid liability. For this reason, state successor liability doctrine strikes an appropriate balance between these competing policies by reinforcing the general rule of non-liability in asset transactions and at the same time creating narrow exceptions to this general rule where there is a need to prevent a creditor from unjustly being left with no recourse. For decades, NSWMA members and other asset purchasers have engaged in asset acquisitions in reliance on this settled, developed, easily discovered and applied traditional rule of non-liability in asset transfers. Indeed, the price paid by the

buyers to the sellers in these transactions reflected the parties' understanding of who would be responsible for the sellers' liabilities.

In contrast, the creation of an as yet undetermined and potentially expansive new rule of successor liability under CERCLA, which would be imposed retroactively on transactions completed decades ago, would undeniably disrupt these prior commercial relationships predicated on established state law. For example, an expansive rule of successor liability violates the policy that there is a need for certainty in transactions, as recognized in *Polius*, 802 F.2d at 83, because an expansive rule of successor liability increases the purchaser's risk of unanticipated liabilities. The imposition of successor liability on a purchasing company long after the transfer of assets defeats the legitimate expectations the parties held during negotiation and sale. CERCLA liability creates particular uncertainty because of contingencies regarding the extent and cost of cleanup, the allocation of liability among responsible parties, and the presence of potential "orphan shares" attributable to insolvent and defunct entities. In sum, adoption of an expansive federal rule of successor liability will displace and negate decades of well-established state law on successor liability, on which businesses properly have long relied.

The Third Circuit's Opinion also wreaks havoc on the ability of companies in the waste industry and others to structure future commercial transactions. Companies attempting to structure business transactions in the future cannot know what the federal common law in a particular court will require and how it may differ from state corporate law that will continue to govern all other aspects of the proposed transaction. The end result is that commercial transactions will either be made without the ability to accurately assess potential future liability, or in many cases, will be avoided.

Assuming, *arguendo*, that a consistent federal common law rule of successor liability endorsing an expansive rule of successor liability is developed, such a rule will in and of itself

have a chilling effect on asset transfers. A rational prospective purchaser will be reluctant to acquire the assets of a business because, as stated above, it will be extremely difficult to predict or project with any degree of accuracy the contingent liabilities of the seller at all locations where it has ever in the past disposed of, treated or used hazardous substances in any phase of its operations. Quite often these contingent liabilities will exceed or even dwarf the value of the purchased assets, thus rendering the assets worthless, and making purchasers unwilling to consummate the transaction. Similarly, under an expansive successor liability rule, a company that desires to cease its operations and sell its assets will have a difficult time locating a single buyer for all of its assets at a favorable price. Instead, the selling company will be forced to sell its assets piecemeal at a less advantageous price. The net result is that assets will not be sold or purchased at their true value. Asset purchasers will be unwilling to acquire a fully integrated business unit from a seller for fear of being saddled with successor liability. Valuable assets will be left to whither on the vine, with a net loss to the seller who is unable to realize the full value of its business unit in a sale. This in turn will result in an economic loss to society.

Finally, the issue of successor liability arises in the vast majority of pending CERCLA cases as a result of the ubiquity of asset transfers and CERCLA's retroactive reach. Millions of dollars of remedial costs are at stake in these cases. The shadow of an unknown or worse yet an expansive federal successor liability rule will, at a minimum, require extensive additional litigation and transaction costs regarding these issues, and may improperly determine many of these successor liability issues.

II. THE THIRD CIRCUIT'S MISAPPLICATION OF THIS COURT'S PRECEDENTS IN ADOPTING A FEDERAL COMMON LAW RULE OF SUCCESSOR LIABILITY UNDER CERCLA HAS CREATED A SHARP CONFLICT AMONG THE COURTS OF APPEALS.

In choosing to create a federal common law of successor liability under CERCLA, the Third Circuit compounded an existing and growing conflict among the circuit courts on the issue of successor liability and on a variety of closely-related CERCLA liability issues regarding state-created business entities. The Third Circuit's creation of a federal common law of successor liability under CERCLA conflicts with the First Circuit's decision in *United States v. Davis*, 261 F. 3d 1, 53-54 (1st Cir. 2001) and the Sixth Circuit's decision in *City Mgmt. Corp. v. U.S. Chemical Co.*, 43 F.3d 244, 250 (6th Cir. 1994), which held that the state law of successor liability applies under CERCLA. The Third Circuit's rejection of the "substantial continuity" test under federal common law conflicts with the Fourth Circuit's decision in *United States v. Carolina Transformer Co. Inc.*, 978 F.2d 832, 837-38 (4th Cir. 1992), and the Eight Circuit's decision in *United States v. Mexico Feed & Seed Co., Inc.*, 980 F.2d 478, 487 n. 9 (8th Cir. 1992) (dicta), which endorse, as federal common law rule, the substantial continuity exception. Finally, the Ninth Circuit in *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 682, 686-87 (9th Cir. 2003) and the Second Circuit in *State of New York v. National Services Industries, Inc.*, 352 F.3d 682, 686-87 (2nd Cir. 2003) have rejected the "substantial continuity" test under CERCLA, but did not state whether they rejected the test under federal common law or rather by adoption of state common law.

The Third Circuit's ruling also creates a sharp conflict with the decisions of sister circuit courts on three closely-related CERCLA liability issues concerning corporate law. First, on the threshold issue of whether a business entity is legally cognizable and subject to CERCLA claims, the courts of appeals have consistently relied on state law. In particular, the Seventh,

Eighth and Ninth Circuits have applied state corporate law to determine the capacity of a dissolved corporation to be sued under CERCLA. *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019-20 (7th Cir. 1995); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987); *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 746 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). In light of these opinions, the Third Circuit's Opinion creates the anomaly that state law determines whether a corporation has the capacity to be sued in the first instance, but federal common law is determinative on the issue of successor liability. By way of example, state law applies to situations where a CERCLA claim is made against a company that dissolved, but has not transferred its assets, while federal common law applies where a claim is made against a company that transfers its assets before dissolving.

Second, the Eleventh Circuit has applied state law rather than federal common law to determine the analogous issue whether limited partners are liable for the acts of a limited partnership under CERCLA. *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501-02 (11th Cir. 1996). In *Redwing*, a case decided after *O'Melveny*, the Eleventh Circuit applied the *Kimbell Foods* test and held that, given the popularity of the limited partnership structure as a means of organizing businesses, "we hesitate to upset the expectations investors have under current state law rules by adopting a federal common law rule." 94 F.3d 1502. The exact same concerns counsel against the Third Circuit's creation of a federal common law rule of successor liability under CERCLA.

Third, the circuit courts, including the Third Circuit, have consistently relied upon state law to determine the validity and interpretation of contractual releases and indemnifications of CERCLA liability contained in contracts between potentially responsible parties. *Aluminum Co. of Amer. v. Beazer East, Inc.*, 124 F.3d 551, 565 (3d Cir. 1997); *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 212-15 (3d Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995); *Olin Corp. v. Consol. Aluminum Corp.*, 5 F.3d 10,

15 (2d Cir. 1993); *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993). Again, the Third Circuit's Opinion creates the anomaly that in interpreting a sales contract, state law determines the scope and effect of any release or indemnity, but federal common law determines whether the very same contract creates successor liability.

III. CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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